

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

DERKIS SANCHEZ	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 2000-170
	)	
MILWAUKEE ELECTRIC TOOL CORP.,	)	
WD-40 COMPANY, and APPLIED	)	
GEOSCIENCES and ENVIRONMENTAL	)	
SCIENCES, INC.	)	
	)	
Defendants.	)	

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ATTORNEYS:

George M. Miller, Esq.  
*For the plaintiff,*

Andrew Simpson, Esq.  
*For the defendant WD-40,*

James Hymes, Esq.  
*For the defendant Milwaukee Tool Corp.,*

Wilfredo Geigel, Esq.  
*For the defendant Applied Geosciences.*

**MEMORANDUM**

Defendant WD-40 Company moves for summary judgment.  
Defendant Applied Geosciences and Environmental Sciences, Inc.  
["AGES"] moves to dismiss a cross-claim for contribution by  
defendant Milwaukee Electric Tool Corp. ["Milwaukee"]. The  
matter came on for hearing on November 19, 2004, and the Court  
heard oral arguments on the previously unopposed motion for  
summary judgment, as well as on the motion to dismiss the cross-

claim. At the close of arguments, I granted WD-40's motion for summary judgment. For the reasons stated more fully herein, I will also deny AGES' motion to dismiss the cross-claim for contribution.

## **I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Derkis Sanchez was employed by Devira, Inc., a Puerto Rican company contracting with AGES to assist with de-commissioning a 1,000 gallon metal fuel storage tank located within a concrete vault on property leased by VITELCO at its Spencely Building facility in Charlotte Amalie. According to plaintiff's complaint, Devira employed Sanchez and others to enter the vault to cut the metal tank and remove it without removing the concrete vault cover. On March 24, 1999, within the confines of the vault, Sanchez was cutting the metal tank with an electric saw. While Sanchez operated the saw, a co-worker sprayed WD-40 on the blade to lubricate the point of contact. Sparks from the saw ignited the WD-40 and as a result there was an explosion and fire. Sanchez sustained severe injuries, and subsequently filed suit against the manufacturer of the saw, WD-40 and AGES. On February 26, 2004, WD-40 moved for summary judgment. Following disputes over discovery, plaintiff's counsel was given until October 15, 2004 to respond to the motion.

Plaintiff's counsel did not do so. On August 4, 2003, AGES filed its motion to dismiss Milwaukee's cross-claim for contribution, which had been served on Milwaukee on June 2, 2003. On June 13, 2003, I granted AGES's motion to dismiss plaintiff's claims against it, thus removing AGES from the case with respect to plaintiff.

## **II. DISCUSSION**

### **A. Motion to Dismiss Cross-Claim for Contribution**

AGES argues in its motion to dismiss the cross-claim for contribution by Milwaukee that AGES was not properly a party in the suit and the claims against it by plaintiff had no merit. In AGES' reply to Milwaukee's opposition memo, AGES further asserted that because its motion to dismiss plaintiff's claims was granted, Milwaukee can no longer maintain a cross-claim against it. At oral argument, AGES also argued that the Third Circuit Court of Appeals has held that actions for contribution are not recognized in this jurisdiction, citing a selective excerpt from *Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1967).

Unfortunately for AGES, *Gomes* stands for the complete opposite proposition from that argued by AGES. Furthermore, "a dismissal of the original complaint as to one of the defendants named therein does not operate as a dismissal of a cross-claim

filed against such defendant by a co-defendant." *Aetna Insurance Co. v. Newton*, 398 F.2d 729, 734 (3d Cir. 1968). I will thus deny AGES's motion to dismiss the cross-claim for contribution.

**B. Summary Judgment Standard**

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The non-moving party may not simply rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the non-movant. *Lawrence v. National Westminster Bank of New Jersey*, 98 F.3d 61, 65 (3d Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). In considering the specific facts presented, the Court must draw all reasonable inferences therefrom in favor of the non-moving party. *Serbin v. Bora Corp.*, 96 F.3d 66, 69 (3d Cir. 1996).

**C. WD-40's Arguments for Summary Judgment**

WD-40 seeks judgment as a matter of law on all claims against it by Sanchez. The first claim is plaintiff's allegation that the labels on the can of WD-40 plaintiff's co-worker used did not comply with the requirements of the Federal Hazardous

Substances Act ["FHSA"], codified in 15 U.S.C. §§ 1261-177.

Plaintiff also makes failure to warn claims.<sup>1</sup> WD-40 argued that the failure to comply claim should be decided in its favor on summary judgment because the label on its product clearly comported with the FHSA requirements. WD-40 also contended that the failure to warn claims should be dismissed because they are preempted by the FHSA. WD-40's summary judgment motion fails to encompass a third set of allegations in Sanchez's second amended complaint, described in paragraphs 19-22, of breach of implied warranty.

At oral argument, plaintiff's counsel stated he would not oppose WD-40's motion with respect to the failure to comply with the FHSA claim and the failure to warn claims. Plaintiff asserted, however, that he had other outstanding claims against WD-40, namely, those for breach of implied warranty and unsafe or negligent design or manufacture of the product. WD-40 argued that the implied warranty claims in the complaint, as well as those for defective condition, were not reiterated in interrogatories propounded on plaintiffs in which WD-40 directly asked plaintiff to identify the grounds for his allegations, and that only the failure to warn claims were identified. Plaintiff

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<sup>1</sup> Plaintiff's second amended complaint does not divide his allegations into separate counts. It is therefore difficult to discern precisely which causes of action he is pursuing.

responded that he had reserved the right to amplify his claims against WD-40 in his response to those interrogatories once discovery had progressed. Plaintiff's counsel also noted he had provided an affidavit pursuant to Federal Rule of Civil Procedure 56(f), together with a motion to compel, stating that WD-40's failure to provide discovery prevented formulation of a response to the summary judgment motion. Numerous discovery conferences have been held in this case, however, and on September 21, 2004, Magistrate Judge Barnard ordered plaintiff to respond to the motion by October 15, 2004. Plaintiff's counsel failed to do so by that date or any date thereafter. I therefore find that plaintiff had ample opportunity to expand upon the implied warranty and defective condition claims, but did not.

Because plaintiff does not oppose summary judgment on the issues of failure to comply with FHSA and failure to warn, and because plaintiff did not act to preserve any other claims against WD-40, I will grant the motion for summary judgment. An appropriate order follows.

*Sanchez v. Milwaukee Tool et al.*  
Civil No. 2000-170  
Memorandum  
Page 7

**ENTERED THIS 22nd day of December, 2004.**

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

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DIVISION OF ST. THOMAS AND ST. JOHN

DERKIS SANCHEZ,	)	
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Plaintiff,	)	
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v.	)	Civ. No. 2000-170
	)	
MILWAUKEE ELECTRIC TOOL	)	
CORPORATION, WD-40 COMPANY, and	)	
APPLIED GEOSCIENCES & ENVIRONMENTAL	)	
SERVICES, Inc.,	)	
	)	
Defendants.		

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*For the defendant Milwaukee Tool,*

Wilfredo Geigel, Esq.  
St. Croix, U.S.V.I.  
*For the defendant Applied Geosciences.*

ORDER

For the reasons stated in the attached memorandum of even date, it is hereby **ORDERED** that the defendant WD-40's motion for summary judgment is **GRANTED** and defendant Applied Geosciences's



*Sanchez v. Milwaukee Tool et al.*  
Civil No. 2000-170  
Order  
Page 2

motion to dismiss the cross-claim for contribution is **DENIED**.

**ENTERED** this 22nd day of December, 2004.

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas K. Moore  
District Judge

ATTEST:  
**WILFREDO F. MORALES**  
Clerk of the Court

By:\_\_\_\_\_/s/\_\_\_\_\_  
Deputy Clerk

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